Supreme Court, U.S.
FILED

961358 FEB 25 1997

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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

MARIA M. OCHOA,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
the UNITED STATES OF AMERICA,
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether, consistent with the "due process" clause of the Fifth Amendment and consistent with In Re Ruffalo, 390 U.S. 544, 551-552 (1968), and In Re Oliver, 333 U.S. 257, 273-278 (1948), a Federal agency, without notice to an applicant at a hearing as to charges of disqualifying deceit by him or her purportedly occurring at the hearing, can after the hearing is concluded raise for the first time charges of such disqualifying deceit and then sanction and disqualify that applicant before the agency based upon the post-hearing charges of disqualifying deceit, and whether RKO General, Inc. v. FCC, 670 F.2d 215, 231-236 (D.C. Cir. 1981), is in conflict with precedent of this Court and should be overruled to the extent that RKO would allow disqualification in such circumstances?

Whether a Federal agency's reliance upon "inferences" from hearing testimony to find deceit or conflicts in testimony to serve as a basis to impose the sanction of disqualification against an applicant is contrary to Steadman v. SEC, 450 U.S. 91, 101 (1981), which requires use of the "preponderance of [substantial] evidence" standard to impose such disqualification?

Whether a disqualified applicant before a Federal agency, who is a minority female, has standing as a "private attorney general" to challenge the grant of a competing applicant in order to raise issues of disparate and discriminatory

treatment by the Federal agency, where it improperly favored a white male applicant over the minority female applicant?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the U.S. Court of Appeals for the D.C. Circuit were Maria M. Ochoa, appellant, the Federal Communications Commission, appellee, and Foothills Broadcasting, Inc., intervenor.

Maria M. Ochoa is an individual and natural person.

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OPINIONS BELOW

The Judgment and the Orders on rehearing and hearing in banc of the U.S. Court of Appeals for the D.C. Circuit denying the relief requested by the petitioner, Maria M. Ochoa, are cited in the Table of Authorities and are included in the Appendix. The Judgment and Orders of the D.C. Circuit are unreported.

JURISDICTION

The D.C. Circuit entered its Judgment on September 23, 1996, in Case No. 95-1092 and Consolidated Case No. 95-1444, denying the appeals of Ochoa from the decisions of the Federal Communications Commission (App. 121a). Ochoa's petitions for rehearing and for hearing in banc were denied in Orders, filed November 27, 1996 (App. 140a). The jurisdiction of this Court is timely invoked under 28 U.S.C. Section 1254 (1). The Solicitor General and the FCC have been served with copies of this petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS

The Constitutional provision cited herein is the Fifth Amendment of the U.S. Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Ochoa's petition arises out of a Federal Communications Commission ("FCC") "comparative" hearing proceeding under the "standard comparative issue" to select the permittee for a new FM radio broadcast frequency in Lenoir, North Carolina. It is a small and virtually all-white town in the western part of the state. Ochoa's application was designated by the FCC for hearing for comparison with the application of Foothills Broadcasting, Inc. ("Foothills"). Hearing Designation Order, 5 FCC Rcd 7079 (1990) (App. 1a-7a).

Ochoa is a an individual applicant and an Hispanic female of Cuban origin. She had previously never filed an FCC "comparative" application, but has substantial past broadcast experience as a General Sales Manager and as a salesperson at several radio stations in North and South Carolina (App. 24a, 34a-35a).

The FCC proceeding was initiated pursuant to the Policy Statement on Comparative Hearings, 1 FCC2d 393 (1965), which utilized the "integration" of ownership into management as the primary criteria for selecting a permittee. In her "integration" proposal, Ochoa pledged at the hearing to move to Lenoir with her family from nearby Charlotte in order to be the full-time on-site General Manager of the proposed station. This pledge was conditioned upon her application being granted (App. 25a-26a).

The principals of Foothills are local residents of Lenoir and are white males (App. 37a-41a). They were not entitled, as was Ochoa, to a then Congressionally mandated preference for minority status. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566 (1990).

Foothills is a corporation with voting and non-voting stockholders. This structure was artificially devised to maximize its "integration" credit. In its "integration" proposal, John Beall, a voting stockholder, pledged to be a part-time on-site Station Manager. Steven Frank, a voting stockholder, pledged to be

a full-time on-site News and Program Director. Wallace Respess, a non-voting stockholder, made no "integration" pledge because he is a full-time practicing attorney. In view of his non-voting status, this would not normally discount the "integration" credit for Foothills (App. 18a-19a, 24a, 37a).

Under the then applicable "comparative" selection criteria, which was "integration" of ownership into management, Ochoa would have prevailed. This is based upon her pledge to move to Lenoir to be a full-time on-site manager of the station, along with her minority and female status and past broadcast experience. Policy Statement on Comparative Hearings, 1 FCC2d 393. In such circumstances, Foothills could prevail if Ochoa was denied "integration" credit or disqualified because of deceit.

After the hearings were held in the FCC proceeding under the "standard comparative issue," the D.C. Circuit ruled that use of the "integration" criteria was inherently "arbitrary and capricious" and therefore unlawful. The FCC then suspended its use. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993).

Application of Ochoa

During the hearing, Foothills sought to discredit, under the "standard comparative issue," Ochoa's hearing pledge to move to Lenoir to effectuate her "integration" proposal. It solicited as

"surprise" witnesses four former co-workers of Ochoa to show that she would not move to Lenoir. Foothills' witnesses testified as to purported conversations they had with Ochoa as to her Lenoir application prior to the hearing. The conversations were prior to Ochoa making to the FCC her pledge to move to Lenoir to effectuate her "integration" proposal, if her application was granted (App. 25a-30a, 83a, 141a-145a).

Foothills' "surprise" witnesses were known to be hostile to Ochoa, were friendly with each other, and had discussed their testimony with each other prior to testifying (App. 102a-103a). One of the Foothills' witnesses, Jake Gurley, had lost his job as General Manager of a Charlotte radio station only months earlier because of Ochoa's allegations against him of sexual harassment (App. 102a, 106a).

Johnny Jacobs, another Foothills' "surprise" witness, had been friendly with a competing applicant and recently had his salary cut because of Ochoa (App. 103a, 118a). Another Foothills' "surprise" witness, Reta Thorn, was hired by Foothills as an employee and manager of the Lenoir station after the conclusion of the FCC hearing (App. 108a).

At the request of Foothills, the ALJ had issued an ex parte subpoena for Thorn to testify as a "surprise" witness against Ochoa under the "standard comparative issue." Although Foothills had known

about Ochoa's anticipated testimony from depositions several months prior to the hearing, it did not make its ex parte subpoena request for Thorn until the eve of the hearing (App. 141a-145a).

After Foothills' "surprise" witnesses testified against Ochoa as to purported conversations they had with her about her Lenoir application, the ALJ refused Ochoa's request to subpoena Vanessa Keys to refute their testimony. Keys had been privy to many of the conversations in question. According to the ALJ, Keys' testimony was not needed because the matter --- Ochoa's pledge at the hearing to move to Lenoir --- was a "narrow comparative point." Memorandum Opinion and Order, FCC 91M-1475, para. 2, rel. April 26, 1991 (App. 8a).

At no time during the hearing, did the ALJ ever state or indicate to Ochoa that her truthfulness or "character" qualifications were in issue because she had given or had admitted to giving inconsistent, misleading, candorless, deceitful, or false testimony, or had changed or revised her testimony or had concealed material information, which could result in her being disqualified as a "liar." In fact, the ALJ stated or indicated during all stages of the hearing that the only matter in issue was the effectuation of Ochoa's "integration" proposal, under the "standard comparative issue," as to her pledge to move to Lenoir, if her application was granted (App. 5a, 8a-9a, 25a, 125a, 141a-151a).

Foothills never sought the specification of a disqualifying character" issue against Ochoa because she had purportedly given or had admitted to giving inconsistent, misleading, candorless, deceitful, or false testimony, or had changed or revised her hearing testimony or had concealed material information. All of the record testimony and evidence it presented against Ochoa was under the "standard comparative issue" (App. 25a, 46a, 51a, 125a, 141a-151a). Indeed, Foothills' ex parte request to the ALJ to subpoena Thorn as a "surprise" witness was made under the "standard comparative issue" (App. 141a-145a).

The Initial Decision, 7 FCC Rcd 1861, 1864-1866, 1869-1870 (ALJ 1992), raised for the first time issues of deceit against Ochoa. It acknowledged that she did not have notice at the hearing of charges against her of disqualifying deceit (App. 47a-48a, 84a, 127a).

Nevertheless, the I.D. disqualified Ochoa as a "liar" because it inferred that she had "substantially changed and revised her hearing testimony," because it inferred that she purportedly "concealed material information" at the hearing, and because, according to the Foothills' witnesses, she purportedly testified "falsely." This was with respect to her "integration" proposal and pledge at the hearing, under the "standard comparative issue," to move to Lenoir (App. 25a-33a, 46a-47a, 145a-151a).

In Decision, 7 FCC Rcd 6569, 6570-6572 (1992), the Review Board affirmed Ochoa's disqualification as a "liar." It held that specific notice at the hearing to an applicant by the FCC that they must testify truthfully, or that their testimony is considered to be untruthful, is superfluous (App. 58a, 84a).

Ochoa was disqualified on the basis of the Board's inference that she had given "inconsistent and candorless" testimony at the hearing as to her conversations with Foothills' witnesses with respect to her pledge at the hearing to move to Lenoir. According to the Board, Ochoa did not testify "candidly." Ochoa purportedly "explicitly" testified that she told co-workers (Foothills' witnesses) she "would move" to Lenoir, but at the end of the hearing, it inferred that she "disavowed" this testimony (App. 51a-61a, 78a-80a, 141a-151a).

In Memorandum Opinion and Order, 8 FCC Rcd 3135, 3136-3137 (1993), the FCC affirmed Ochoa's disqualification as a "liar." It held that the lack of notice to Ochoa at the hearing of charges of disqualifying deceit was a "mere technicality" (App. 84a). The FCC disqualified Ochoa based on its inference that she had given "deceitful" testimony at the hearing. It inferred that there is a "significant difference" between Ochoa's initial and subsequent hearing testimony as to her conversations with co-workers (Foothills' witnesses) with respect to her pledge at the hearing to move to Lenoir.

The FCC thus concluded that her initial testimony was "deliberately misleading" (App. 81a-92a, 145a-151a).

The conflict or discrepancy which the FCC inferred from Ochoa's testimony was her initial testimony that she "intended to move to Lenoir" and its characterization of her later testimony that she "deliberately lead [Foothills' witnesses] to believe that there was little or no chance that she would move to Lenoir." According to the FCC, Ochoa gave no indication in her initial hearing testimony that she had said anything that could have caused anyone to suppose that she did not mean to carry out her "integration" pledge at the hearing to move to Lenoir (App. 85a-86a, 145a-151a).

The FCC also disqualified Ochoa for "deceit" on the basis that Ochoa's hearing testimony was contradicted by Foothills' witnesses and she had not refuted their testimony as to her conversations with them (App. 86a-92a). However, the FCC ruled that the ALJ did not commit reversible error by refusing Ochoa's request to subpoena Vanessa Keys who was privy to the conversations between Ochoa and Foothills' witnesses (App. 92a).

The FCC in Memorandum Opinion and Order, 9 FCC Rcd 56, 57-59 (1993), denied Ochoa's petition for reconsideration. It affirmed its holding that Ochoa had not been denied "due process" by lack of notice at the hearing of charges of disqualifying deceit (App. 97a). The FCC

affirmed Ochoa's disqualification based on "misrepresentations," "outright lies," and "repeated lies" (App. 93a, 96a-107a).

The FCC's holding was based upon "discrepancies" which it inferred from Ochoa's hearing testimony that she had been "less than candid" in initially responding to cross-examination questions about her conversations with Foothills' witnesses as to whether she intended to move to Lenoir. According to the FCC, Ochoa "conceded" in her concluding testimony that she had deliberately lead Foothills' witnesses to believe that there was little likelihood that she would ever quit her job and move to Lenoir (App. 93a, 96a-107a 145a-151a).

In Order, 10 FCC Rcd 142 (1995), the FCC denied Ochoa's petition for further reconsideration (App. 118a-119a). Ochoa timely filed a notice of appeal with the D.C. Circuit as to her disqualification and the denial of her application.

In Order, Case No. 95-1092, filed June 6, 1995, the D.C. Circuit directed that Ochoa's appeal be held in abeyance. This was because no final action had been taken by the FCC with respect to the application of Foothills.

Application of Foothills

The ALJ formally specified misrepresentation issues against Foothills as to its ownership and control with respect to its "integration" proposal

(App. 10a). In Initial Decision, 7 FCC Rcd 1861, 1863-1864, 1869, Foothills was disqualified and its application denied. This was based on credibility findings by the ALJ that Wallace Respess, a non-voting stockholder who was represented not to be in control, is the actual "moving force" in the application, is his venture and under his control, and the voting stockholders follow his instructions (App. 18a-24a, 44a-46a).

However, the Review Board in Decision, 7 FCC Rcd 6569, 6575, reversed the credibility findings of the ALJ and granted the application of Foothills. It concluded that the role of Respess had not been misrepresented because it could discern no deceptive intent or abusive conduct (App. 51a, 68a-78a).

The FCC in Memorandum Opinion and Order, 8 FCC Rcd 3135, affirmed the grant of Foothills' application. It held that the testimony of Respess was not "fallacious" (App. 81a-82a). However, the FCC in Memorandum Opinion and Order, 9 FCC Rcd 56, 59-61, specified disqualifying issues as to whether Foothills had reasonable assurance of access to its proposed tower site. This included whether Foothills had attempted to deceive the FCC in pleadings in response to Ochoa's motions to enlarge the issues (App. 93a, 107a-117a).

In Supplemental Initial Decision ("S.I.D."), 9 FCC Rcd 3100, 3101-3103 (ALJ 1994), these specified issues were

resolved in favor of Foothills. The S.I.D. rejected the sworn testimony of four landowners that they had never given Foothills any assurance of access over their property to its proposed tower site. Their sworn testimony was considered to be the "pleasure of imagination." The S.I.D. failed to address the specified issue as to whether Foothills attempted to deceive the FCC in responses to Ochoa's motions.

In Decision, 10 FCC Rcd 4323 (1995), the Review Board affirmed the S.I.D. That decision was affirmed by the FCC in Order, 10 FCC Rcd 8746 (1995) (App. 120a). Ochoa timely filed a notice of appeal of the grant of Foothills' application. In Order, filed October 6, 1995, the D.C. Circuit consolidated that appeal with the earlier appeal of Ochoa as to her disqualification.

In Judgment, filed September 23, 1996, the D.C. Circuit denied the appeals of Ochoa (App. 121a). It held that Ochoa "should have been on notice that her candor was specifically at issue" (App. 133a). Moreover, because Ochoa had been disqualified by the FCC, she had no standing to challenge the grant of the application of Foothills. In any event, no evidence of deceit by Foothills was found. The Judgment was not reported (App. 137-139).

In Orders, filed November 27, 1996, Ochoa's petitions for rehearing and for hearing in banc were denied. These Orders were not reported (App. 140a).

REASONS FOR GRANTING THE PETITION

(a) The petition for writ of certiorari raises an important question of Federal law, as to whether, consistent with the "due process" clause of the Fifth Amendment and consistent with In Re Ruffalo, 390 U.S. 544, 551-552 (1968) and In Re Oliver, 333 U.S. 257, 273-278 (1948), a Federal agency, without notice to an applicant at a hearing as to charges of disqualifying deceit by him or her purportedly occurring at the hearing, can after the hearing is concluded raise for the first time charges of such disqualifying deceit purportedly occurring at the hearing and then sanction and disqualify that applicant before the agency based upon the post-hearing charges of disqualifying deceit, and whether RKO General, Inc. v. FCC, 670 F.2d 215, 231-236 (D.C. Cir. 1981) is in conflict with precedent of this Court and should be overruled to the extent that RKO would allow disqualification in such circumstances?

The action of the FCC in sanctioning Ochoa by disqualifying her, as a broadcast applicant, for deceit without giving her notice at the hearing of the charge of disqualifying deceit, is a denial of "due

process" under the Fifth Amendment of the U.S. Constitution and is in conflict with precedent of this Court. In Re Ruffalo, 390 U.S. 544, 551-552 (1968), holds that where a sanction or penalty is imposed by an agency, the affected person is entitled to "procedural due process," which includes fair notice at the hearing of the charges of the alleged disqualifying misconduct.

A person's right to notice at the trial of the charges against which he must defend is well-established. Gray v. Netherland, 116 S.Ct. 2074, 2083 (1996), citing, In Re Ruffalo. The charges must be known before the proceedings or hearings commence. They become a trap when after the proceedings or hearings are underway, they are amended on the basis of the testimony of the accused. He is thus given no opportunity to expunge the earlier statements and start afresh. In Re Ruffalo, at 551-552.

The failure to afford a person a reasonable opportunity to defend himself or herself against the charge of false and evasive testimony is a denial of "due process" of law because the right to reasonable notice of the charges is basic to our system of jurisprudence. In Re Oliver, 333 U.S. 257, 273 (1948). "It is the law of the land that no [person's] life, liberty, or property be forfeited as a punishment until there has been a charge fairly made and fairly tried."

"No principle of procedural due

process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, are among the Constitutional rights of every [person]." Notice of the charges is a "safeguard essential to liberty in a government dedicated to justice under law." Cole v Arkansas, 333 U.S. 196, 201-202 (1948). Where there is a fundamental lack of "due process" in a proceeding, this Court will not hesitate to act. Honda Motor Co., Ltd. v. Oberg, 114 S.Ct. 2331, 2340 (1994).

Ochoa was disqualified and branded by the FCC as a "liar." However, it failed to give Ochoa notice at the hearing, or to confront her at the hearing, with the charge that she was at risk of the ultimate sanction of disqualification because her truthfulness or "character" qualifications had been put into issue based upon the testimony which opposing witnesses had given against her, or based upon testimony which she had given (App. 8a, 25a, 125a, 141a-151a). As held in In Re Ruffalo, 390 U.S. at 551-552, the absence of fair notice as to the precise nature of the charges deprives a person of procedural "due process."

Although the FCC held a rebuttal hearing to consider the testimony of opposing witnesses who contradicted Ochoa's testimony, the ALJ repeatedly indicated that the matters in question were with respect to the "standard comparative issue" (App. 8a, 25a, 125a,

141a-151a). Thus, Ochoa only had notice that the effectiveness of her comparative "integration" proposal to move to the city of license was in issue, not her candor.

The fact that two opposing witnesses give testimony which contradicts the other does not per se raise an issue that one of them is a "liar" (App. 125a). Under the "standard comparative" issue, when two opposing witnesses give contradictory testimony, the consequence is that one side will or will not carry its burden of proof as to the effectuation of its "integration" proposal (which would not result in disqualification and would not necessarily result in denial of an application). As held in Evansville Skywave, Inc., 7 FCC Rcd 1699, 1700, para. 14 (1992), the failure of an applicant to prove its "integration" proposal does not imply a finding of deceit.

The FCC and the D.C. Circuit held that Ochoa "should have been on notice that her candor was specifically in issue" (App. 127a, 133a). However, an applicant is not required to guess or to speculate as to what issues are being considered. Radio Athens, Inc. v. FCC, 401 F.2d 398, 404 (D.C. Cir. 1968), "full and explicit notice" by an agency is the "heart of administrative due process." Satellite Broadcasting Co., Inc. v. FCC, 824 F.2d 1, 3-4 (D.C. Cir. 1987), if an agency uses its own interpretation to cut-off an applicant's rights, it must give "full" notice" and not force the applicant to play "Russian Roulette."

Agencies "may not turn the provision of notice into a game of bureaucratic hide and seek." MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1142 (D.C. Cir. 1995). Where "opacity" of the FCC's statements renders them susceptible to other meanings, an applicant will not be bound by the FCC's post hoc interpretation. RCA Global Communications, Inc. v. FCC, 758 F.2d 722, 731 (D.C. Cir. 1985).

The record shows that Ochoa was not given such "full and explicit" notice at the hearing by the FCC that it was charging her with disqualifying deceit (App. 8a, 25a, 125a, 141a-151a). The D.C. Circuit acknowledged that Ochoa was given no such actual notice by concluding that she "should have been on notice that her candor was specifically in issue." (App. 133a).

The charge of disqualifying deceit was first raised by the FCC in the Initial Decision, which was after Ochoa concluded her hearing testimony and after the hearing concluded (App. 10a, 25a, 32a-33a). Thus, Ochoa had no opportunity to defend, explain, or clarify her hearing testimony at the time of testifying with respect to charges of disqualifying deceit (App. 141a-151a).

After Ochoa testified, the ALJ said nothing to her about him considering her concluding testimony to contradict her earlier testimony, or that she had admitted or conceded to earlier giving false or misleading testimony or had

willfully concealed material information (App. 141a-145a). However, "due process," as guaranteed by the Fifth Amendment and by the precedent of this Court, requires Ochoa to have been confronted by the ALJ while she was still on the hearing stand and specifically told that he considered her testimony to be disqualifying deceit and that she was charged with this alleged misconduct.

Such confrontation while on the hearing stand, would have given Ochoa the opportunity to explain or to clarify any apparent or perceived inconsistency between her initial and her concluding testimony with respect to charges of disqualifying deceit. In Re Ruffalo, 390 U.S. at 551-552. The FCC's failure to give Ochoa notice at the hearing of the charge of disqualifying deceit, or to confront her at the hearing with such charges, would require that her disqualification be vacated or reversed.

The fact of an applicant taking an oath prior to testifying that he or she will testify truthfully is not notice which is legally sufficient to inform one that the testimony that they have given is considered by the agency to be inconsistent or untruthful and that they are charged with disqualifying deceit (App. 33a). If so, there would never be a need to give an applicant actual notice of charges of deceit against them.

However, the precedent of this Court, of the D.C. Circuit, and of the FCC

requires that specific notice of being charged with disqualifying deceit be fully given to applicants testifying under oath before they complete their testimony. In Re Ruffalo, 390 U.S. at 551-552; West Coast Media v. FCC, 695 F.2d 617, 620 (D.C. Cir. 1982), deceit by an applicant should not be discussed in the absence of a special designated issue; Policy Statement on Comparative Broadcast Hearings, 1 FCC2d at 399, there must be a special designated issue in order to consider evidence of "bad character" or deceit.

The record of this proceeding shows that Ochoa was the victim of a "trial by ambush." This is demonstrated by the failure of the ALJ to ever put Ochoa on notice at the hearing that her truthfulness or "character" was in issue because of the testimony which she had given, or to confront Ochoa at the hearing with charges of disqualifying deceit and allow her to explain her previous testimony with respect to such disqualifying charges (App. 32a-33a, 145a-151a).

Trials are not poker games in which prosecutors can conceal their cards until played. Williams v. Smith, 399 U.S. 78, 82 (1970). As noted in Zauderer v. Office of Disciplinary Counsel, 471 U.S.626, 655, n. 18 (1985), what was "particularly offensive" in In Re Ruffalo was the agency's change of the charges against the petitioner, such that the very evidence put on by the petitioner in defense of the

original charges became inculpatory under the revised charges. Thus, the original charges functioned as a "trap," for they lulled the petitioner into presenting evidence that resulted in disqualification under charges not then made by the agency. Id., 390 U.S. at 551, n. 4.

This same "offensive" and unconstitutional tactic was used by the FCC against Ochoa. It took testimony given by Ochoa to demonstrate her "integration" pledge under the "standard comparative" issue and then after the hearing concluded made it inculpatory for purposes of disqualifying her, without notice to her at the hearing that she was charged with disqualifying deceit based upon her testimony under the "standard comparative issue" (App. 8a, 25a, 32a-33a, 125a, 141a-151a).

Both the FCC and the D.C Circuit relied upon RKO General, Inc. v. FCC, 670 F.2d 215, 231-236 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982), to disqualify Ochoa (App. 58a, 100a, 131a-132a). To the extent that this decision allows a Federal agency to disqualify an applicant without full and explicit notice at the hearing as to charges of disqualifying deceit, it should be overruled as in conflict with the Fifth Amendment and as in conflict with precedent of this Court in In Re Ruffalo, 390 U.S. 544, 551-552, and in In Re Oliver, 330 U.S. 257, 273-278.

RKO General, Inc. v. FCC, 670 F.2d at 235-236, moreover allows summary

disqualification where the petitioner's conduct was committed directly before the agency and where a further trial or hearing would presumably be an unnecessary use of agency resources. However, In Re Oliver, 333 U.S. at 260, n. 2, 274-276, prohibits the use of summary imposition of sanctions, even where the petitioner's misconduct was committed before the court (except where there is an open threat to the order of the court which must be instantly suppressed) and even where another trial would presumably be an idle gesture. Thus, RKO General, Inc. v. FCC, 670 F.2d at 235-236, should be overruled to the extent that it is in conflict with the Fifth Amendment and with precedent of the Court.

Accordingly, it is requested that certiorari be granted. An important question of Federal law is raised which requires resolution by the Court. This question is whether the action of the FCC in sanctioning and disqualifying Ochoa without notice to her at the hearing of the charge of disqualifying deceit is in conflict with fundamental principles of "due process," as required by the Fifth Amendment, and is in conflict with In Re Ruffalo, and with In Re Oliver? Moreover, an important question of Federal law is raised as to whether certain aspects of RKO General, Inc. v. FCC, 670 F.2d 215, 231-236, are in conflict with the Fifth Amendment and with In Re Ruffalo and In Re Oliver, and thus whether RKO should be overruled in this respect?

(b) The petition for writ certiorari raises an important Federal question of law as to whether a Federal agency's reliance upon "inferences" from hearing testimony to find deceit or conflicts in testimony to serve as a basis to impose the sanction of disqualification against an applicant is contrary to Steadman v. SEC, 450 U.S. 91, 101 (1990), which requires use of the "preponderance of [substantial] evidence" standard to impose such sanction?

The petition for writ of certiorari raises an important question of Federal law as to whether the FCC's reliance upon "inferences" from Ochoa's hearing testimony to find deceit by her or conflicts in her testimony to serve as a basis to impose the sanction of disqualification against her is contrary to Steadman v. SEC, 450 U.S. 91, 101 (1981). That precedent requires use of the "preponderance of [substantial] evidence" standard.

As held in Steadman, in order for a Federal agency to impose sanctions, such as disqualification for deceit, it must demonstrate misconduct by a "preponderance of [substantial] evidence," or weight of the evidence, and not by the minimal "substantial evidence" standard. Steadman v. SEC, id. "Substantial evidence" is something less than the weight of the evidence. Consolo v. FMC, 383 U.S. 607,

620 (1966).

The FCC has acknowledged that in disqualifying an applicant for deceit it must demonstrate that it is more likely than not that an applicant engaged in such misconduct. It may not merely "infer" that such misconduct occurred. Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6906, para. 18 (1991). However, in spite of a clear legal mandate from this Court to use the "preponderance of [substantial] evidence" standard to impose the ultimate sanction of disqualification and the FCC's own acknowledgement of that standard, the FCC used the less exacting "substantial evidence" standard to disqualify Ochoa.

The decisions of the FCC are improperly based upon "inferences" from Ochoa's hearing testimony which can only be justified under the less exacting "substantial evidence" standard (App. 132a). As an example, the FCC made the inference from Ochoa's hearing testimony that she had told opposing witnesses of her "commitment" to move to the city of license if she was granted the license (App. 123a, 145a-151a). The FCC also made the inference from Ochoa's hearing testimony at the initial hearing that she told opposing witnesses she would move to the city of license and later "disavowed" this testimony (App. 129a, 145a-151a).

The D.C. Circuit suggests that Ochoa's hearing testimony contains "irremediable" conflicts, which mean

impossible to correct or to repair (App. 131a). Webster's University Dictionary (1984). However, purported conflicts based upon inferences from hearing testimony are by definition simply not irremediable (App. 145a-151a).

Accordingly, certiorari should be granted. An important question of Federal law is raised which requires resolution by the Court. This question is whether the action of the FCC in disqualifying Ochoa based merely on "inferences" from her hearing testimony, to make findings of deceit or to find conflicts in her testimony, is directly contrary with precedent of this Court mandating the use of the "preponderance of [substantial] evidence standard of proof by a Federal agency, and not use of the less exacting "substantial evidence" standard, to impose the ultimate sanction of disqualification against an applicant?

(c) The petition for writ of certiorari raises an important question of Federal law as to whether a disqualified applicant before a Federal agency, who is a minority female, has standing as a "private attorney general" to challenge the grant of a competing applicant in order to raise issues of disparate and discriminatory treatment by the Federal agency, where it improperly favored a white male applicant over the minority female applicant?

The Judgment of the D.C. Circuit denied Ochoa standing to challenge the grant of the application of Foothills. This was because she had been disqualified by the FCC (App. 137-139).

According to the D.C. Circuit, as a disqualified applicant, Ochoa can challenge the grant of the application of Foothills only if the FCC applied disparate standards to their applications with respect to the same conduct arising out of the same factual circumstances. Here, Ochoa and Foothills engaged in similar conduct, but arose from different factual circumstances (App. 137a-139a). The D.C. Circuit's holding was based upon Garden State Broadcasting L.P. v. FCC, 996 F.2d 386, 395 (D.C. Cir. 1993), citing, Jacksonville Broadcasting Corp. v. FCC, 348 F.2d 75, 79 (D.C. Cir. 1965).

However, such an unduly narrow and

constricted holding limiting standing is in conflict with broad principles enunciated by the Court allowing standing. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982), holds that standing can be shown by a petitioner demonstrating (1) some actual or threatened injury that (2) fairly can be traced to the challenged action and (3) is likely to be redressed by a favorable decision.

Ochoa's application is in competition with the application of Foothills. Thus, she has been injured by the denial of her application and the grant of Foothills' application by the FCC based upon disparate standards and discriminatory treatment.

Whether the FCC applied disparate standards to the same misconduct arising out of the same factual circumstances and engaged in by both parties is not dispositive of the issue of unequal treatment. As recognized by Melody Music, Inc. v. FCC, 345 F.2d 730, 732-733 (D.C. Cir. 1965), the use of disparate legal standards with respect to any aspect of the same proceeding requires that the decision be vacated or reversed.

In its "comparative hearing" proceeding, the FCC engaged in disparate and discriminatory treatment of Ochoa, an Hispanic female, in comparison to Foothills, a competing applicant composed of white males, and thus engaged in racial

and gender discrimination in violation of the Fifth Amendment. The FCC gave more lenient treatment to Foothills, which was found to have made disqualifying misrepresentations with respect to its "integration" proposal. Such disparate and discriminatory treatment is a denial of "due process."

In Initial Decision, 7 FCC Rcd 1861, 1863-1864, 1869, the ALJ disqualified Foothills because it misrepresented the role of one of its principals as to its "integration" proposal. In so doing, the ALJ made credibility findings with respect to the testimony of Foothills' principals and found a logical motive to deceive --- to maximize its "integration" credit --- the same motive that the ALJ found as to Ochoa (App. 18a-24a, 44a-46a).

The disqualification of Foothills was based upon a properly and timely specified issue charging it with misrepresentation. Thus, there is no question that it had notice at the hearing of the charge of deceit (App. 10a).

In Decision, 7 FCC Rcd 6569, 6575, the Review Board reversed the credibility findings by the ALJ and found Foothills qualified. According to the Board, it could find no evidence of deceptive intent or abusive conduct by Foothills. The FCC affirmed this ruling (App. 69a-77a, 81a-82a, 137a).

However, in a conflict between the factual and credibility findings of an ALJ

and that of the Review Board, the FCC owes its deference to the ALJ who actually heard the testimony. Bechtel v. FCC, 957 F.2d 873, 877-878 (D.C. Cir. 1992); Faulkner Radio, Inc. v. FCC, 557 F.2d 866, 870 (D.C. Cir. 1977), credibility resolutions by ALJ's are entitled to great weight on judicial review, unless predicated upon material errors of law.

In the case of Foothills, the ALJ's factual and credibility findings were not contradicted by other record evidence and were not predicated upon a material error of law. The FCC simply choose to ignore the ALJ's findings. This improper action by the FCC was the only way in which it could grant Foothills' application.

In the case of Ochoa, the ALJ's factual and credibility findings were based upon a material error of law. The error of law was the ALJ's failure to give Ochoa notice at the hearing of the charge of disqualifying deceit based upon the testimony that she had given or others had given against her. This error of law was the only way in which the FCC could deny Ochoa's application.

The FCC thereby improperly stigmatized as a "liar" an Hispanic female applicant, with extensive broadcast experience, seeking to be awarded an FM radio broadcast permit in a small and virtually all-white town. The FCC's post hoc characterization of Ochoa as a "liar" resulted from her pledge at the hearing to move to Lenoir, the city of license, with

her husband and children.

Thus, the FCC violated fundamental "due process" rights of Ochoa. It engaged in racial and gender discrimination by improperly favoring an applicant composed of local white males over an out-of-town Hispanic female.

The D.C. Circuit arbitrarily cut-off Ochoa's right to raise these "due process" issues of disparate and discriminatory treatment based upon a narrow and hypertechnical view of standing. Moreover, the D.C. Circuit ignored its long-established precedent allowing standing by a "disappointed" applicant to act as a "private attorney general" in order to prevent the granting of an application through improper or "illegal" agency action. National Federation of Federal Employees v. Cheney, 883 F.2d 1038, 1052 (D.C. Cir. 1989).

Nothing could be more improper or "illegal" by a Federal agency than to engage in racial and gender discrimination. "Disappointed" applicants acting as "private attorney generals" can be an effective instrument to expose and prevent improper or illegal actions by Federal agencies.

Accordingly, certiorari should be granted. An important question of Federal law is raised which requires resolution by this Court. This question is whether a disqualified applicant before the FCC, who is a Hispanic female, has standing as a

"private attorney general" to raise issues of disparate and discriminatory treatment by the FCC, where it improperly favored an applicant composed of white males over her application? Moreover, the question is raised as to whether Garden State Broadcasting L.P. v. FCC, 996 F.2d 386, 395, should be overruled to the extent it unduly limits standing by applicants to challenge improper or illegal FCC actions?

CONCLUSIONS

WHEREFORE, in view of the foregoing, the Court is urged to grant Ochoa's petition for certiorari and review this case because of conflicts with the "due process" clause of the Fifth Amendment and conflicts with precedent of this Court. Moreover, this case raises an important Federal issue as to standing by a "private attorney general" to challenge Federal agency actions, which requires consistent application by the Federal courts.

Respectfully submitted,

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By:_____

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